UNITED ASIAN BANK BHD.

v.

CHIA SAI YENG

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. 100 OF 1982]
10 MAY 1984

LAND LAW: *Charge - Order for sale - Whether valid - Non compliance of O. 83 r. 3 and s. 257(1) (c), National Land Code - Effect - Form 16D - Whether defective - conversion of overdraft current account into fixed term loan account - Whether charge affected - Whether conversion authorised - National Land Code s. 257(1)(c).*

The appeal was against an order for sale of the land charged by the defendant ("the chargor") in favour of the plaintiff ("the chargee") to secure money advanced to a firm owned or controlled by a son of the chargor. The firm had an overdraft account for RM30,000 secured by the charge in question and obtained a further advance to be secured by a compulsory savings account with the chargee. Later, the overdraft account of RM50,000 was converted into a fixed term loan of the same amount, to be repaid by instalments. After paying one such instalment, the firm defaulted. The chargee gave notice of the arrears and recovered the further advance of RM20,000.

Held:

[1] The amount and interest need not be stated in the originating summons. The requirement under O. 83 r. 3, Rules of the High Court 1980 and s. 257 (1)(c), National Land Code that the amount and interest due be stated is a requirement imposed on the Court when making an order for sale. Further, s. 257 (1)(c) is merely directory.

[2] The notice in Form 16D was not defective.

(a) The letter of demand sent to the firm and extended to the chargor constituted a valid demand when it was followed by the notice in Form 16D. A demand can be made in any form, not necessarily in Form 16E, so long as it is followed by a Form 16D notice.

(b) Further, as the charge was a "third party" charge, the argument that the Form 16D was defective because the chargor was not liable to pay the sum of arrears of monthly instalments must also fail.

[3] The chargor was liable for the amount due on the fixed term loan.

(a) The fixed term loan was secured by the charge originally covering the overdraft account. Clauses 6, 7 and 28(a) and (f) of the annexure to the charge sufficiently validated or provided for the conversion of the overdraft current account into the fixed term loan account without in any way impairing the validity of the charge.

(b) The overdrawn balance was fully paid up on 27 March 1981 because the overdraft current account was on the date converted into a fixed term loan account. It must have been a simple matter of balancing the accounts books to wipe out the overdrawn balance with money from the fixed term loan account.

(c) The signing of the "third party" charge clothed the son with apparent or ostensible authority to deal with the chargee and the further advance and conversion were made within the scope of that authority.

[Objections of chargor dismissed. Sale and costs ordered.]

Cases referred to:
Citibank NA v. Wong Ngai Poh [1983] CLJ (Rep) 515
Jacob v. Oversea-Chinese Banking Corporation Ltd., Ipoh [1974] 2 MLJ 161

Legislation referred to:
Rules of the High Court 1980, O. 83 r. 3.
National Land Code 1965, s. 257 (1)(c).

For the plaintiff/applicant - A.K. J. D'Cruz; M/s. A.K.J. D'Cruz & Co.
For the defendant/respondent - William J.K. Leong; M/s. Joseph Tan & Tang

JUDGMENT

Peh Swee Chin J:

This is an appeal against an order of sale of the land charged by the defendant, (whom I shall call the chargor), in favour of the plaintiff, (which I shall call the chargee), to secure money advanced to a firm called Y.C. Tan Electricity Co., (which I shall call the firm), owned or controlled apparently by a son of the chargor by the name of Tan Ying Chuan otherwise known as Y.C. Tan. I now give my grounds of judgment.

The salient and undisputed matters need to be set out. Clause 1, 2, 4, 6, 7, 28(a) and (f) and 29 of the annexure to the charge in question, provided as follows:

1.The Chargor(s) will on demand pay to the Bank all sums of money which are now or shall from time to time or any time hereafter be due or owing by

Y.C. TAN ELECTRICITY CO.

(hereinafter called the "Customer(s)") solely or jointly with any other persons firms or companies and whether as principal or surety or which the Customer(s) may be or become liable to the Bank anywhere on banking account or accounts current or otherwise or in any manner whatsoever ... howsoever up to an aggregate sum of Dollars Thirty Thousand only (RM30,000.00) for principal only together with interest thereon additionally at the rate of Nine per-centum (9%) per annum with monthly rests ...

2. Any demand for payment of the moneys intended to be hereby secured may be made by a notice in writing in such form as may be prescribed by or under the National Land Code and may be signed on behalf of the Bank by the Manager, ...

4. Subject always to the provisions of the clause next following the interest on any principal moneys for the time being hereby secured including capitalised interest shall at the end of one calendar month be capitalised and added for all purposes ...

6. The security created by this Charge is expressly intended to be and shall be continued security for all moneys whatsoever now or hereafter from time to time owing to the Bank by the Customer(s) whether alone or jointly and severally with another or others and whether as principal or surety notwithstanding that the Customer(s) may at any time or times cease to be indebted to the Bank for any period or periods and notwithstanding that the account or accounts of the Customer(s) with the Bank may from any cause whatsoever cease to be a current account or accounts and notwithstanding any settlement of account or accounts or otherwise.

7. The Bank may at its discretion from time to time at the request of the Chargor advance to the Customer(s) such further sum or sums of money beyond the limit hereinbefore as the Bank may deem fit and such sum or sums so advanced shall form part of the money hereby secured.

28. The Bank may at any time and without in any way affecting the security hereby created:

(a) determine vary or increase any credit or other facility granted to the Customer(s) and may open and/or continue any account or accounts current or otherwise with the Customer(s) at any branch or branches of the Bank;

(b) ...

(c) ...

(d) ...

(e) ...

(f) open any other current or other accounts with the Customer(s).

29. In the event of any breach by the Chargor(s) of any of the agreements covenants terms stipulations and undertakings herein provided on the part of the Chargor(s) to be observed and performed (other than the agreement or covenant to pay the sum for the time being owed to the Bank on demand as aforesaid) occurring and continuing for a period of not less than seven (7) days it shall be lawful for the Bank forthwith to give notice to the Chargor(s) under s. 254 of the National Land Code requiring the Chargor(s) to remedy the said breach within a period of not less than fourteen (14) days and service of such notice shall be effected in the same manner as a notice demanding payment of the balance due as hereinbefore provided.

The chargor raised a number of objections against the chargee's application for an order of sale. First, learned Counsel for the chargor submitted that provisions of O. 83 r. 3 of the Rules of the High Court 1980 and s. 257(1) (c) of the National Land Code had not been complied with, in that, the amount and interest due were not stated anywhere in the Originating Summons. I will repeat what I said in *Citibank N.A. v. Wong Ngai Poh* [1983] CLJ (Rep) 515, 516:

> It will be immediately apparent that this is requirement imposed on the Court when making an order for sale, as distinct from a requirement imposed on a chargee when filing an 'application for an order for sale. However, the chargor herein, was not complaining that he was misled as to the amount due but that there was failure to comply with s. 257(1) (c). Putting the argument of learned Counsel at its highest, let's say, that there was an implicit requirement on the chargee to specify the exact amount of interest, such requirement would have been deemed as complied with by the chargee supplying the necessary data, such as the rate of interest and the material dates etc. to enable the Court to determine, if need be, the exact amount, as was done in the case ...

I further held in that case that s. 257(1) (c) had often been regarded as merely directory.

The second objection raised was that Form 16 D used herein was void and defective because, (a) it was a condition precedent that a letter of demand should be sent before sending Form 16D and (b) it was a "third party" charge, (presumably in reference to the charge being for the benefit of the firm), the chargor was not required to pay instalments as set out in the Form 16 D herein.

There was however a letter of demand dated 30 September 1981 addressed to the firm from the chargee's solicitors, (Exhibit A to the affidavit of S. Govindaramulu dated 22 February 1983), asking for a sum of RM5,910 owing from the said firm being the amount of five monthly

instalments. A copy of this letter was extended to the chargor. This letter, in my view, constituted a valid demand when it was followed by the notice in Form 16 D dated 24 February 1982. It is pertinent to point out that some time but not immediately after the receipt of the said Form 16D, the chargor sent a letter dated 8 July 1982 (Exhibit B to the same affidavit), offering to pay RM10,000 to account of the sum of due and thereafter the monthly instalments as before. The Exhibit B was not marked "Without Prejudice", neither did it raise any of the objections that were subsequently raised before the Court. It was held as regards the validity of such a demand, in *Jacob v. Oversea-Chinese Banking Corporation Ltd., Ipoh, FC* [1974] 2 MLJ 161, where a similar point was raised in a case also of money repayable on demand, that such demand need not be made in Form 16 E, and that it could be made in any other form, so long as it was followed by a Form 16 D as was done in that case and in the instant case, the Federal Court having had to consider a clause there similar to Clause 2 set out above in the instant case. The argument about the failure of prior demand for money owing therefore failed. I will deal more with the Exhibit B later. The argument about the Form 16 D here being defective simply because the chargor was not liable to pay the sum of arrears of monthly instalments failed, on learned Counsel's own submission in fact that it was a "third party charge" i.e. a charge of the land in question to secure money lent to the firm. The argument was therefore without any merit.

The third objection raised appeared to be the *piece de resistance* of learned Counsel's submissions. He submitted that the charge created in this case was to secure an overdraft facility of RM30,000 as distinct from a fixed term loan of RM50,000, the latter was granted in fact to chargor's son's firm, *vide* Ex. 3 to the affidavit of chargor dated 10 October 1983. The amount due, it was submitted to the effect, being related to the fixed term loan, she was not liable for it, because, (i) the fixed term loan was not secured by the charge herein; (ii) it was agreed, by virtue of enclosure annexed to Ex. CSY 3 to the affidavit of the chargor dated 10 October 1983 that the fixed term loan was to be secured by a first charge on the land concerned herein to secure its first RM30,000, and by a second charge on the same land to secure the balance of RM20,000; together with a guarantee document to be signed by the chargor, and both the second charge and the guarantee document were not signed; (iii) the chargor was not aware of, and would never have consented to, the fixed term loan; (iv) the fixed term loan was a further advance referred to in Clause 7 set out above, and should have been at the request of the chargor and not as in this case at the request of her son, and that she had never granted to her son a power of attorney; (v) the letter dated 4 August 1982, being Ex. B referred to above was not written or caused to be written by her, she being an illiterate and the signature was not hers, and (vi) as shown from Ex. CSY 2(t) to the affidavit of the chargor dated 10 October 1983, (being one of the monthly statements of account of her son's firm) the overdraft balance was, on 27 March 1981, fully paid up, i.e. at that stage of the "running" account of her son's firm with the chargee and at that time, the chargee should have executed a discharge of the charge herein, no money being at that time and stage owing by the firm to the chargee.

Learned Counsel for the chargee in reply submitted by relying on Clause 6, 27 and 28 respectively, as set out above. As regards letter dated 4 August 1982 (Ex, B to affidavit of S. Govindaramulu dated 22 February 83) which the chargor denied was written or caused to be written by her, it was submitted that her son had not made any affidavit on it, i.e. in supporting what his mother (the chargor) had alleged.

To understand better learned Counsel's arguments, it would be necessary to go into the nature of transactions between the chargee and the chargor's son's firm as explained for the first time in the affidavit of S. Govindaramulu dated 2 November 1983 which was not contradicted by any further affidavit from the chargor, or anybody else. The firm had an overdraft account for RM30,000 secured by the charge in question and obtained a further advance to be secured by a "compulsory" savings account which the firm was obliged to open or have with the chargee. Apparently later, the firm decided to request to be allowed to convert this overdraft account of RM50,000 into a fixed term loan, of the same amount, the fixed term loan to be repaid by instalments of RM1,183 per mensem. After paying only one such instalment, the firm defaulted in the payment of subsequent monthly instalments. The chargee gave notice of such arrears and recovered the said further advance of RM20,000 apparently by appropriating, lawfully in my view, the money standing to the credit of the firm in the said savings account, leaving the original balance of RM30,000 and interest still owing. The conversion of the overdraft current account into the fixed term loan account was at the request of the firm according to the chargee, and this enabled the firm to reduce the interest payable by the firm, because, in an overdraft current account, the interest was capitalised at the end of each month. The conversion represented a saving of interest; and therefore was of advantage to the firm. It was not necessary to create a second charge because the further advance of RM20,000 was already secured by the "compulsory" savings account. Besides, the affidavit stated, that by not creating a second charge, the chargor saved a lot of legal charges.

In my view, Clause 6, 7 and 28 (a) and (f), on a true construction of the same, sufficiently validated or provided for the conversion of the overdraft current account into the fixed term loan account without in any way impairing the validity of the charge herein. The balance now claimed, whether it represented in fact the balance of a fixed term loan of RM50,000 or the original overdrawn balance of RM30,000 with interest lent upon the initial overdraft facility, was covered by and secured by the present charge herein. This would dispose of points (i), (ii) and (vi) above. Further as regards point (vi), the overdrawn balance of RM30,000 together with interest, was, from that particular monthly statement, fully paid up-on 27 March 1981, because obviously and undeniably the overdraft current account was on the same date converted into a fixed term loan account. Please see, e.g. para. 7 of the affidavit of the chargor dated 10 October 1983. It must have been a simple matter of balancing the accounts books to wipe out the overdrawn balance with money from the fixed term loan account. As regards points (iii) and (iv) respectively in my view, the signing of the present charge referred to by learned Counsel for the chargor as a "third party" charge, to secure money to be lent to her son's firm by the chargee, clothed her son with apparent or ostensible authority to deal with the chargee (the bank in question) in regard to the advancing of money to her son's firm from the chargee, subject of course, to any express restrictions or limitations in the annexure to the charge. Were it otherwise, there would be no safety in mercantile transactions. On a true construction of the clauses set out above, it would also bear out such an inference of the chargor's son, or rather her son's firm being in the same position as agent or agents for the chargor in relation to dealings with the chargee. Quite apart from the fact that the further advance of RM20,000 in fact was secured by the savings account and this had been repaid by the chargee's appropriation of the money in the savings account, so that it became unnecessary to decide whether she should be liable for the further loan of RM20,000 supposedly not at her request, I had no doubt that the further advance of RM20,000 was made on the request of the chargor's son within the limits of his ostensible authority explained above even though it was not at the behest of the chargor. The conversion of the overdraft

account to a fixed term loan account was not only authorised by the clauses set out above, notably Clause 6 and 28, it would have been well within the scope of such ostensible authority with which her son was clothed even though the quantum limit was exceeded, i.e. the further advance of RM20,000. The points (iii) and (iv) therefore also failed. As regards the letter dated 4 August 1982 which the chargor denied was written on her behalf or by her (such denial being presumably to give credence to her assertion that the further advance of RM20,000 or the conversion of the overdraft account to the fixed term loan account was without her knowledge or consent), in view of my conclusions on the question of her son's ostensible or apparent authority and the construction of the clauses set out above it would not be necessary to decide on her *non-est-factum* allegation though I must say that the bare denial of any knowledge of the letter was regarded by the Court with considerable misgivings. I therefore dismissed the objections of the chargor and made an order of sale and costs in terms of the Originating Summons herein.

Also found at [1984] 2 CLJ 123